No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee.

Reply on Behalf of Appellant, General Insurance Company of America, a corporation, to Petition For Rehearing.

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COPY

GEORGE PENNEY

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LOS ANGELES, CAL

October 6, 1944

The Honorable Judges of the
U. S. Circuit Court of Appeals
San Francisco, California.

Gentlemen:

Re: No. 10494 - General Insurance Co. of America
vs. Pathfinder Petroleum Co.

While we would not ordinarily respond to a reply to a petition for rehearing, we do feel constrained to point out that, in addition to other reasons, the case of Fidelity-Phoenix Insurance Co. v. Benedict Coal Corp. (C.C.A.4), 64 Fed. (2d) 347 at 353, referrred to on page 4 of the reply of the General Insurance Company of America, is not applicable to the situation in the case at bar because, as the record clearly shows, there was not a total destruction of the property in the case at bar as there was in the case relied upon by the Feneral Insurance Company of America. General Insurance Company of America itself admits that the destruction applied only to a portion of the plant.

The most unusual statement, however, of the entire reply is the following sentence, found on page 4.

"If any depreciation should have been considered under Item II, it is to be presumed that the trial court did so consider it."

The record, however, clearly shows, again, that the trial court did not consider any depreciation in connection with Item II; and, since we cannot construe the statement in the reply as anything but a left-handed admission that depreciation would have been proper under Item II, we cannot see why, in justice, we should now penalized because, in presenting the case before the trial court, we put depreciation in the wrong column.

If the General Insurance Company had taken the position which it took in the passage just quoted, the trial court would surely have permitted an amendment in accordance with such a theory. We therefore earnestly urge again that this honorable court give additional consideration to the matter of depreciation and that the obvious injustice to the Pathfinder Petroleum Company resulting from

a technical position of the insurance company be rectified.

Respectfully submitted,

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Reply on Behalf of Appellant, General Insurance Company of America, a corporation, to Petition For Rehearing.

Because of two misstatements of fact contained in the petition for rehearing filed in the above entitled matter

by Pathfinder Petroleum Company, a corporation, we respectfully request permission to file this reply to said petition.

I.

Petitioner claims that if, under Item I of the policy, depreciation is deducted from gross profits in arriving at net profits, then that depreciation should be allowed as an item of fixed charge under Item II of the policy, and that consequently it does not matter whether depreciation is taken into consideration as (petitioner claims) it would not affect the final result.

Petitioner then says on page 6, "In conformity with the theory on which this case was tried without objection, depreciation should be eliminated from the fixed charges, and by the same token it *not be deducted from the profits.*" (Italics in petition.)

We emphatically deny that the case was tried on any such theory. It has always been the contention of appellant, General Insurance Company of America, that depreciation is an item of current expense, and is one of the items which must be deducted from gross profits in order to arrive at net profits. In fact this contention was very strongly urged upon the trial court at all times during the trial of the case, and was also urged all through our briefs upon appeal.

Thus, we would refer the court to page 303 of the transcript on appeal where the following appears:

> "Mr. Delamer: We claim in estimating whether or not you made any profit you must consider depreciation. You have not considered depreciation in arriving at what you claim to be the net profit."

Likewise, we would call the court's attention to defendant's Exhibits C & D [Tr. pp. 126 and 127, 346 and 347], showing the relationship between profits with and without depreciation and selling prices.

Likewise, on page 36 of our opening brief, we made the following direct statement:

> "Depreciation must, however, be taken into consideration. It is an item of expense of doing business like any other item and may not be ignored. (*Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C.C.A. 4), 64 Fed. (2d) 347 at 353)."

Again, in view of the fact that we contended that the trial court did not deduct depreciation in arriving at the net profits, but that such depreciation should have been so deducted, all of the figures in our briefs were given with and without depreciation.

Likewise, we contended in the trial court that depreciation occurring before the fire did not continue thereafter since destroyed property did not depreciate. Thus, we introduced evidence as to the portion of the plant which was destroyed by the fire [Tr. pp. 226-229], and also expert testimony that depreciation after the fire would not be the same as depreciation before the fire [Tr. p. 370].

Evidence of the amount of depreciation was introduced, and this court has held that the trial court did not allow an erroneously small item of depreciation as a deduction from gross profits. What, if any, allowance the court made under Item II for such depreciation as would continue after the fire cannot be determined from the record

in view of the peculiar basis adopted by the trial court in arriving at its judgment under Item II of the policy. If any depreciation should have been considered under Item II, it is to be presumed that the trial court did so consider it.

As said by this court in its opinion (page 8) in affirming that portion of the judgment of the trial court with reference to Item 2:

> "There is no showing of prejudice in the amount awarded. On this ground we sustain the award of $7,348.63."

In this connection we would again call this court's attention to the case of *Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C.C.A. 4), 64 Fed. (2d) 347, at 353:

> "And we agree with the learned judge in his dealing with depreciation and depletion under the heading of fixed charges. Depreciation on property which has been destroyed is not to be allowed as a fixed charge, even though it must be considered in estimating profits which would have been earned if the business had gone on; for manifestly property which has been destroyed cannot depreciate."

We repeat our statement and the record, both in the trial court and on appeal, substantiates that statement, that this case was NOT tried upon the theory, or any similar theory, that depreciation should be eliminated from the fixed charges and by the same token it not be deducted from the gross profits in order to arrive at net profits.

II.

Petitioner also states:

> "We believe that these portions of the opinion are plain and that, in conformity therewith, the total amount of the judgment thereunder is the sum of $7,348.63 on account of fixed charges, and $3,901.15 on account of the polymerization plant, or a total of $11,249.78 plus interest. To our surprise, however, we find in discussions with the attorneys for the insurance company, that they construe the closing paragraph of the court's opinion to mean that the question of the profits on the polymerization plant must be relitigated."

Again petitioner has misstated our position.

We understand this court to have held that had there been no fire the use of the polymerization plant would have saved to the plaintiff the sum of $3,901.15, which would not have been saved to the plaintiff had it not been for such polymerization plant.

We understand the decision of this court to be that in arriving at the profit or loss which the plaintiff would have made or sustained during the suspension period had it not been for the fire, this saving of $3,901.15 must be taken into consideration.

We do not understand the decision of this court to be that the plaintiff is entitled to the sum of $3,901.15 as a separate amount to be recovered by it so that in any event it should recover this amount of $3,901.15 under Item I of the policy in addition to the $7,348.63 under Item II of the policy.

We understand the decision of this court to be that if, under Item I, taking this $3,901.15 into consideration, the plaintiff would have made a net profit during the suspension period, then the plaintiff is entitled to such net profit in addition to the fixed charges and expenses of $7,348.63 under Item II of the policy.

On the other hand, we also understand the decision of this court to be that if, notwithstanding the allowance of $3,901.15 on account of the polymerization plant, the plaintiff nevertheless *would still not have made any net profit* during the suspension period, then the plaintiff is entitled to no recovery under Item I of the policy, but is limited to the recovery of its fixed charges and expenses under Item II thereof, which fixed charges and expenses are now fixed by the judgment of the trial court, affirmed by this court, in the sum of $7,348.63.

WHEREFORE, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

W. O. SCHELL,

GERALD F. H. DELAMER,

Attorneys for Appellant, General Insurance Company of America, a corporation.